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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1962

No. 1008

W. R. ARTHUR & CO., INC.,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

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W. R. ARTHUR & CO., INC.,

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WISCONSIN DEPARTMENT OF TAXATION,

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APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

I. DECISION APPEALED FROM

This is an appeal from a Judgment or Mandate of the Supreme Court of the State of Wisconsin. The opinion delivered in that Court is reported as *W. R. Arthur & Co., Inc. v. Wisconsin Department of Taxation,* (November 27, 1962) 18 Wis. 2d 225, 118 N. W. 2d 168. A copy of the opinion is appended to this statement as a part of the Appendix pp. 1a-8a. A copy of the Judgment or Mandate is appended to this statement as a part of the Appendix pp. 8a-9a.

II. THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. *The Nature of the Proceeding*

This is an action commenced by the appellant taxpayer in the Circuit Court of Dane County, Wisconsin, to review a March 16, 1961 decision of the Wisconsin Board of Tax Appeals affirming an assessment upon taxpayer of $34,490.09 additional Wisconsin income taxes for 1953 through 1956 inclusive.

The Dane County Circuit Court concluded that the Department's apportionment arbitrarily assigned income to Wisconsin, at least to the extent of 33 1/3% because, disregarding the facts in the record before it, the Department improperly assigned 100% of the taxpayer's gross revenues to Wisconsin.

Appellee Wisconsin Department of Taxation thereupon appealed to the Supreme Court of the State of Wisconsin which reversed the Circuit Court by Judgment or Mandate entered November 27, 1962 and directed reinstatement of the decision of the Wisconsin Board of Tax Appeals. Motion for rehearing was denied February 5, 1963.

This appeal is taken pursuant to 28 U. S. C. A. Section 1257(2).

B. *Dates of Judgment Appealed From and Notice of Appeal.*

The Judgment or Mandate of the Supreme Court here appealed from, was dated and entered November 27, 1962.

Appellant's motion for rehearing was denied February 5, 1963 by The Wisconsin Supreme Court.

The Notice of Appeal to the Supreme Court of The United States was filed in the Supreme Court of the State of Wisconsin on February 13, 1963.

C. *Statute Conferring Jurisdiction*

The appellate jurisdiction of the United States Supreme Court rests upon 28 U. S. C. A. Section 1257(2), providing for appeals from the highest court of a state

> "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

D. *Cases Sustaining Jurisdiction*

The Wisconsin Board of Tax Appeals is created by Section 73.01 Wisconsin Statutes as the sole reviewing agency of determinations by the Wisconsin Department of Taxation, which in turn are reviewable by the Wisconsin Court (Section 73.015 Wisconsin Statutes).

An order of the Wisconsin Board of Tax Appeals, exercising its legislative authority, constitutes a statute under the provisions of said Section 1257(2), of 28 U. S. C. A.

Live Oak Water User's Ass'n v. Railroad Commission, 269 U. S. 354, 356, 70 L. ed. 305, 308, 46 S. Ct. 149;

Lake Erie & Western R. Co. v. Public Utilities Comimssion, 249 U. S. 422, 424, 63 L. ed. 684, 687, 39 S. Ct. 345;

Suetan R. & T. Co. v. Department of Labor, 277 U. S. 13 136, 72 L. ed. 819, 821, 48 S. Ct. 505;

Hamilton v. Regents, 293 U. S. 245, 258, 79 L. ed. 343, 350;

Atchison R. Co. v. Public Utilities Commission, 346 U. S. 346, 348-9, 98 L. ed. 51, 58.

E. *Statute Involved*

The Statute involved is Section 71.07 Wisconsin Statutes; its pertinent language has not been amended since 1951. Said statute is hereinafter set forth. Subsection (2) thereof prescribes a three factor formula for taxation of persons engaged in a unitary business within and without Wisconsin. Concededly two of the factors, namely (cost of manufacturing and sales) are inappropriate to the appellant taxpayer. Subsection (5) provides for the establishment of a departmental rule where the statutory formula is inappropriate. This rule is hereinafter set forth.

"Section 71.07

"(1) * * *

"(2) Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state. The amount of such income attribut-

able to Wisconsin may be determined by an allocation and separate accounting thereof, when the business of such person within the state is not an integral part of a unitary business, * * *. In all cases in which allocation and separate accounting is not permissible, the determination shall be made in the following manner: (There follows a provision for the deduction of nonapportionable income). The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

"(a). The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with his trade or business everywhere.

"(b) In the case of persons engaged in manufacturing or in any form of collecting, assembling or processing goods and materials, the ratio of the total cost of manufacturing, collecting, assembling or processing within this state to the total cost of manufacturing, or assembling or processing everywhere. * * *

"(c) In the case of trading, mercantile or manufacturing concerns the ratio of the total sales made through or by offices, agencies or branches located in Wisconsin during the income year to the total net sales made everywhere during said income year.

"(3) Where, in the case of any person engaged in business within and without the state of Wisconsin and required to apportion his income as herein provided, it shall be shown to the satisfaction of the department of taxation, that the use of any one of the 3 ratios above provided for gives an unreasonable or inequitable final average ratio because of the fact that

such person does not employ, to any appreciable extent in his trade or business in producing the income taxed, the factors made use of in obtaining such ratio, this ratio may, with the approval of the department of taxation, be omitted in obtaining the final average ratio which is to be applied to the remaining net income.

"(4) * * *

"(5) If the income of any such person properly assignable to the state of Wisconsin cannot be ascertained with reasonable certainty by either of the foregoing methods, then the same shall be apportioned and allocated under such rules and regulations as the department of taxation may prescribe.

"(6) * * *"

RULE INVOLVED

"TAX 2.45 APPORTIONMENT IN SPECIAL CASES. When the business of any person within Wisconsin is an integral part of a unitary business conducted within and without Wisconsin, but because of unusual or unique circumstances the portion of the income of such person derived from business transacted in Wisconsin cannot be ascertained with reasonable certainty by use of the apportionment formula provided in section 71.07(2) of the statutes (or by separate accounting in view of the unitary nature of the business); the department will substitute in the place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin. In any case in which an apportionment of business income is made pursuant to this regulation, the taxpayer, at the time of the asessment, will be apprised of the factors used in the formula adopted.

The business income of interstate air carriers shall be apportioned as provided in section Tax 2.46."

The above statute appears in Volume 1, Wisconsin Statutes 1961, pages 1476 and 1477.

The above Rule appears in Volume 6, Wisconsin Administrative Code, Rules of Department of Taxation, Section 2.45, page 14a.

III. THE QUESTION PRESENTED BY THE APPEAL

Has the appellant taxpayer been denied its right to due process under Article XIV of The Amendments to the Constitution of the United States, where, to determine taxpayer's Wisconsin taxable income, the Wisconsin Department of Taxation has applied a three factor apportionment formula, and has used one factor that assigns all of taxpayer's gross revenues to Wisconsin, despite a clear factual record that a substantial part of such revenues are earned by services performed and business transacted in other states.

IV. STATEMENT OF THE CASE

A. *Material Facts*

The undisputed facts show appellant taxpayer is a unitary business, incorporated in Illinois and engaged in interstate commerce pursuant to an I. C .C. contract motor carrier permit issued under Section 209 of Part II of the Interstate Commerce Act. Pursuant thereto, taxpayer transports for General Motors Corporation only, new Chev-

rolet automobiles and trucks from taxpayer's principal office in Janesville, Wisconsin, to points in Wisconsin, Illinois, Indiana, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska and Montana. Authority to transport to Nebraska, South Dakota, North Dakota and Montana was acquired on May 21, 1956. The remaining destination states were served throughout all the tax periods in question (1953-1956). About 2% of its traffic did not originate in Janesville, Wisconsin, but was comprised of Illinois intrastate traffic, interstate traffic between points in states other than Wisconsin and interstate traffic from outside Wisconsin to Wisconsin points.

The appellant taxpayer filed its returns upon the basis of a single apportionment factor, its proportion of revenue miles in Wisconsin compared to its revenue miles everywhere. (*Central Greyhound Lines, Inc. v. Mealey* (1948), 334 U. S. 653, 92 L. ed. 1633, 68 S. Ct. 1260). This resulted in the following in Wisconsin proportion.

1953	1954	1955	1956
55.776%	49.977%	51.214%	50.858%

The Wisconsin Department of Taxation in assessing a deficiency, prescribed a three factor formula consisting of (a) assignment of 100% of the appellant's gross revenues to Wisconsin, (b) the proportion of appellant's revenue miles in Wisconsin compared to its revenue miles everywhere, and (c) the appellant's payroll in Wisconsin compared to its total payroll everywhere.

The undisputed facts show that the appellant's gross revenues were compensation for its four service activities, to-wit:

(1) A rate for each mile that each automobile or truck was transported. As stated above, Wisconsin revenue miles varied from 49.977% in 1954 to 55.776% in 1953.

(2) A surcharge for the loading and unloading activity involved in each automobile or truck handled. Ninety per cent of the unloadings occurred outside Wisconsin.

(3) A surcharge for each 150 mile block of transportation of each automobile or truck, after the first 150 miles. This surcharge was applied largely to movements outside Wisconsin.

(4) A surcharge where a portion of the automobiles or trucks was delivered to one consignee and the balance to one or more others. This activity occurred at least 90% outside Wisconsin.

The appellant taxpayer filed a timely petition for review of the action of the Wisconsin Department of Taxation to the Wisconsin Board of Tax Appeals, pursuant to Section 73.01(6) Wisconsin Statutes, the sole remedy provided by Wisconsin Statutes. Inter alia said petition stated:

> "That the tax so assessed to petitioner and computed by said formula by the respondent, subjects to taxation in Wisconsin income derived by petitioner from property located outside and business transacted outside the state of Wisconsin, in violation of Sections 71.01 and 71.07 Wisconsin Statutes and in violation of Article XIV of the Amendments to the United States Constitution." (R. 207)

The taxpayer appellant thereafter filed a timely petition for review of the Decision of said Wisconsin Board of Tax Appeals, with the Circuit Court for Dane County,

Wisconsin, under the sole remedy provided by the Wisconsin Statutes, Section 73.015 and Chapter 227. In such petition appellant taxpayer again asserted, inter alia, that the action of the Wisconsin Board of Tax Appeals "unlawfully imposes income taxes by the State of Wisconsin upon income derived from business transacted and property located outside the State of Wisconsin" and "is contrary to the constitutional rights and privileges of petitioner." (R. 125, 126)

From the decision of the Circuit Court of Dane County, Wisconsin, favorable to appellant taxpayer, Wisconsin Department of Taxation appealed to the Wisconsin Supreme Court, which rendered the judgment or mandate from which this appeal is taken. Appellant taxpayer timely moved the Wisconsin Supreme Court for rehearing, upon the basis inter alia that said judgment or mandate resulted in imposing an extra-territorial tax by the State of Wisconsin, contrary to Article XIV of the Amendments to the United States Constitution.

The Wisconsin Supreme Court denied the appellant's motion for rehearing, without opinion on February 5, 1963.

V. THE QUESTION IS SUBSTANTIAL

The issue involved in this appeal, is similar to that in *Central Greyhound Lines v. Mealey,* 334 U. S. 653, 92 L. ed. 1633, 68 S. Ct. 1260. There the Court held that the State of New York may not impose a gross receipts tax, unapportioned, upon interstate transportation where the facts disclosed such transportation activities to be over

routes also utilizing the highways of Pennsylvania and New Jersey.

In the instant case, the State of Wisconsin has employed the prohibited method of taxation as one of three factors of equal weight in assessing income taxes upon appellant.

Because of the addition of the factor assigning 100% of the taxpayer's gross revenues to Wisconsin, irrespective of the sources from which they were produced, the resulting Wisconsin proportion is as follows:

1953	1954	1955	1956
75.074%	71.512%	71.814%	71.801%

This case is similar to that of *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U. S. 123, 75 L. ed. 879, 51 S. Court 385. There the taxpayer was organized under the laws of New York but had a manufacturing plant in North Carolina. The income from its business was derived from three sources—buying profit, manufacturing profit and selling profit. The evidence showed that the average income having its source in the manufacturing and tanning operations in North Carolina was 17 to 21.7% whereas North Carolina taxed approximately 80%. This Court concluded that the statutory method of the State of North Carolina operated unreasonably and arbitrarily in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the taxpayer in that state, and that the taxes were therefore imposed beyond the state's authority.

This Court has consistently held that where a state levies income taxes upon a taxpayer, which is a unitary business conducting its business activities in more than one state, the tax can only be sustained if it is not discriminatory and is properly apportioned to the activities within the taxing state.

This principle was stated by this Court as late as *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357, 67 A. L. R. 2d 1292.

Here the Wisconsin Court construed the Wisconsin Statute as authorizing a three factor formula including a factor attributing 100% of the taxpayer's gross revenues to Wisconsin.

Wisconsin has attempted to avoid the invalidity of the use of a formula composed of assignment of 100% of gross revenue to Wisconsin, by utilizing it to the extent of one-third. This reduces its impact, but since the use of such a factor alone violates the taxpayer's constitutional rights, it is none the less offensive when used to the extent of one-third, or in any other substantial proportion.

This issue is of heavy consequence to every industry conducting a unitary business in more than one state. It is of particular importance to all transportation businesses operating in more than one state. It is an issue that can be resolved only by decision of the United States Supreme Court.

It is respectfully requested that the Supreme Court o the United States take jurisdiction over this appeal.

Respectfully submitted,

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Taxpayer's gross revenues are derived from four sources: (1) A flat rate per mile per unit transported; (2) a loading and unloading fee for each vehicle handled; (3) an additional fee per cargo unit for each 150 miles after the first 150 miles; and (4) an additional surcharge for loads termed "splits," that is, where part of a load is delivered to one dealer, with the balance of the load delivered to another dealer.

The decision and order of the board of tax appeals affirmed an assessment of additional Wisconsin income taxes for the years 1953 through 1956 against the respondent taxpayer. The additional assessment resulted from an apportionment of the taxpayer's net business income in which a three-factor formula was used. The formula consisted of revenue miles, payroll and originating revenue.

The taxpayer appealed the decision of the board of tax appeals to the circuit court for Dane county on the grounds that the originating revenue factor used in the above formula measured and taxed services performed by the taxpayer outside of Wisconsin in violation of sec. 71.07 (2), Stats. The circuit court agreed with this contention and reversed the board's decision. In reversing the board, the circuit court deleted the originating revenue factor from the formula used by the board and inserted in its place a tangible property factor. The final formula prescribed by said court was made up of a revenue mile factor, a payroll factor and a property factor. It is from the use of this formula that the department of taxation appeals.

Sec. 71.07, Stats., provides, so far as here material:

"(1) * * *

"(2) Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state. The amount of such income attributable to Wisconsin may be determined by an allocation and separate accounting thereof, when the business of such person within the state is not an integral part of a unitary business, * * * In all cases in which allocation and separate accounting is not permissible, the determination shall be made in the following manner: [There follows a provision for the deduction of non-apportionable income.] The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

"(a) The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with trade or business everywhere . . .

"(b) In the case of persons engaged in manufacturing or in any form of collecting, assembling or processing goods and materials, the ratio of the total cost of manufacturing, collecting, assembling or processing within this state to the total cost of manufacturing, or assembling or processing everywhere. . . .

"(c) In the case of trading, merchantile or manufacturing concerns the ratio of the total sales made through or by offices, agencies or branches located in

Wisconsin during the income year to the total net sales made everywhere during said income year.

"(3) Where, in the case of any person engaged in business within and without the state of Wisconsin and required to apportion his income as herein provided, it shall be shown to the satisfaction of the department of taxation, that the use of any one of the 3 ratios above provided for gives an unreasonable or inequitable final average ratio because of the fact that such person does not employ, to any appreciable extent in his trade or business in producing the income taxed, the factors made use of in obtaining such ratio, this ratio may, with the approval of the department of taxation, be omitted in obtaining the final average ratio which is to be applied to the remaining net income.

"(4) . . .

"(5) If the income of any such person properly assignable to the state of Wisconsin cannot be ascertained with reasonable certainty by either of the foregoing methods, then the same shall be apportioned and allocated under such rules and regulations as the department of taxation may prescribe.

"(6) . . ."

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216 *Rule Involved*

"Tax 2.45 Apportionment in Special Cases. (Section 71.07 (5), Wis. Stats.) When the business of any person within Wisconsin is an integral part of a unitary business conducted within and without Wisconsin, but because of unusual or unique circumstances the portion of the income of such person derived from business transacted in Wisconsin cannot be ascertained with reasonable certainty by use of the apportionment

formula provided in section 71.07 (2) of the statutes (or by separate accounting in view of the unitary nature of the business), the department will substitute in the place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin. In any case in which an apportionment of business income is made pursuant to this regulation, the taxpayer, at the time of the assessment, will be apprised of the factors used in the formula adopted. The business income of interstate air carriers shall be apportioned as provided in section Tax 2.46."

217 GORDON, J. The legislature recognized that there would be difficulties in apportioning the taxes of a unitary business which operates partly in Wisconsin and partly outside this state. A "unitary" business is one which functions as a single unit; that is, it is not divided into a separate entity for each of the states in which it operates. The legislature also recognized that no fixed formula would fairly fit all the multitudinous types of business. Accordingly, it gave a broad mandate to the department of taxation in sec. 71.07 (5), Stats., to prescribe rules to fit those cases which do not fall within the other provisions of sec. 71.07.

W. R. Arthur & Co., Inc., is a unitary company engaged in a multi-state trucking business. It is clear that the statutory formula contained in sec. 71.07 (2) is inappropriate for purposes of apportioning the income of this taxpayer; the statutory formula is designed for manufacturing and mercantile enterprises.

As reflected in sec. 2.45 of the Wisconsin Administrative Code, the department of taxation has adopted a rule to govern those cases which do not fall within the statutory formula. In such special cases the department "will substitute in the place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin." The problem before us is whether the factors and the formula used in the instant case fairly accomplish that purpose.

The taxpayer's principal argument is that the "originating revenue" factor is arbitrary and improper. In this case the originating revenue factor equals the gross receipts. The two other factors which are employed in the formula adopted by the board of tax appeals (revenue 218 miles and payroll) are not challenged by the taxpayer.

In using 100 per cent of the taxpayer's gross revenue in its formula, has the appellant improperly weighted its formula so that it seeks to tax income derived from business transacted outside of Wisconsin?

We reach the conclusion that the originating revenue or gross receipts factor is not an arbitrary one, nor does it taint the ultimate formula adopted by the board of tax appeals. As applied to this particular taxpayer, the inclusion of 100 per cent of gross receipts as one factor in a three-factor formula constitutes a reasonable means of reflecting the company's income attributable to business done in Wisconsin. The formula takes into consideration the peculiar nature of its business activity; it also takes into consideration the fact that the respondent's one and only

customer is in Wisconsin and that the taxpayer is headquartered in this state.

If used as a single factor, gross receipts would result in all of the taxpayer's income being taxed here, and this would obviously constitute an unfair tax. However, when it is used in conjunction with the two other factors, it cannot be said to be arbitrary or to result in an unfair apportionment of the income of the respondent under sec. 71.07 (5), Stats. The case of *Department of Taxation v. Blatz Brewing Co.* (1961), 12 Wis. (2d) 615, 108 N. W. (2d) 319, did not purport to interpret sec. 71.07(5), and is therefore not controlling.

If one of several factors is challenged, it must be evaluated by the court not only upon its own merits but also in relation to the other factors, as well as in relation to the total composite result. Thus, the court must look not only at the individual factors but also at the final formula. We believe that in context with each of the other factors included in the formula adopted by the board of tax appeals in the instant case, the factors are all reasonable.

219 When a multi-factor formula is used, each factor must bear a reasonable relationship to the taxpayer's business and to the other factors of the formula; it must also produce a fair apportionment when set in combination with other germane factors. The test is not whether, standing alone, a given factor produces a fair apportionment.

In our opinion, the taxpayer did not meet its burden of proving that the formula adopted by the board of tax appeals unfairly apportioned its income in Wisconsin. This

court has placed the burden of proof upon the taxpayer in such cases as *Department of Taxation v. O. H. Kindt Mfg. Co.* (1961), 13 Wis. (2d) 258, 268, 108 N. W. (2d) 535, and *Laabs v. Tax Comm.* (1935), 218 Wis. 414, 424, 261 N. W. 404. However, we have not heretofore resolved the question of the burden of proof regarding an allegedly arbitrary formula as applied to an interstate taxpayer. We share the view expressed by the United States Supreme Court in *Butler Bros. v. McColgan* (1942), 315 U. S. 501, 507, 62 S. Ct. 701, 86 L. ed. 991:

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed."

By the Court—Judgment reversed with directions to enter judgment affirming the order of the Wisconsin board of tax appeals.

212 JUDGMENT OR MANDATE OF SUPREME COURT OF WISCONSIN ENTERED NOVEMBER 27, 1962

(Formal parts omitted)

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter

judgment affirming the order of the Wisconsin Board of Tax Appeals.

101-122 OPINION OF THE CIRCUIT COURT
OF DANE COUNTY, WISCONSIN
FILED NOVEMBER 22, 1961
(Formal parts omitted)

101 NATURE OF ACTION

This is an action under Chapter 227 to review a decision and order of the Wisconsin Board of Tax Appeals (hereinafter referred to as the Board) affirming an additional income tax assessment made by the respondent Wisconsin Department of Taxation (hereinafter referred to as the Department) upon the petitioner W. R. Arthur & Company, Inc., (hereinafter referred to as the taxpayer) for the calendar years 1953 to 1956, inclusive.

FACTS

The taxpayer, an Illinois corporation with its corporate offices and main terminal in Janesville, Wisconsin, is a contract carrier. Taxpayer serves only one customer, General Motors Corporation, and its principal and practically sole function is to deliver Chevrolet cars and trucks manufactured at the Janesville, Wisconsin, plant to Chevrolet dealers located in some 11 states, including Wis-
102 consin. The other states include Illinois, Indiana, Iowa, Minnesota, Missouri and the upper peninsula of Michigan. On March 27, 1956, taxpayer was authorized to make

deliveries in the states of Montana, North Dakota and Nebraska.

In conveying the vehicles in question taxpayer for the most part uses the haulaway or truckaway method. Under this method four passenger cars or three trucks are loaded on a semi trailer at Janesville and driven by taxpayer's drivers to their respective points of destination. Where the destinations were in certain areas of Iowa, Nebraska, Minnesota, North Dakota or Montana, the load would pass through intermediate terminals of the taxpayer. These might be one or more. At such terminals the tractor or power unit of the taxpayer is unhitched from the loaded trailer and another power unit substituted, with a new driver. The cargo units are also re-inspected at such terminals and the tractor or power unit is serviced before being dispatched. Most of taxpayer's deliveries were multiple rather than single. However, where single deliveries were made it was the practice to make them in relatively the same general area so that, for example, a trailer would not have to travel a long distance with only one car or truck as its load.

About 4 per cent of the vehicles were transported un-
103 der their own power by employees of the taxpayer. This is called the drive-away method. Approximately 98 per cent of the hauls originated in Janesville while about 90 per cent of the deliveries were made outside of the State of Wisconsin.

As indicated, taxpayer maintains its main terminal at Janesville with another Wisconsin terminal located at Black River Falls. A permanent terminal was established at Manchester, Iowa, in 1954 but prior thereto and as early

as 1953 a temporary terminal was utilized at Cedar Rapids, Iowa. A Minnesota terminal on an experimental basis existed in Minnesota during the latter part of 1956 which finally culminated in a permanent terminal being established in Anoka, Minnesota, in that year.

The Manchester, Iowa, terminal had about 30 tractors with drivers, shop personnel of four or five persons, several supervisory employees and an office clerk. There were also other facilities for parking and servicing the tractors and trailers at the Iowa terminal.

Approximately 5 to 15 tractor units were stationed at the Minnesota location. In all the taxpayer owned and operated approximately 300 tractors and 225 semi trailers during the years in question. Of the tractors about 200 104 were stationed at Janesville, 60 at Black River Falls, and the rest at the Iowa and Minnesota terminals as indicated. At the Black River Falls, Iowa and Minnesota terminals the tractor or power units would be exchanged for a different tractor and a new driver would continue with the load after the vehicle had been serviced at the respective terminals.

It should be pointed out that the taxpayer is strictly a one-way carrier. At least 98 per cent of its revenue is obtained from the movement of freight in one direction. The return is empty and produces no revenue.

Taxpayer's gross revenues are derived from four sources. (1) a flat rate per mile per unit transported, i.e., originally this was 9 cents per mile for each passenger car and 12 cents per mile for each truck. A semi trailer holds four passenger cars or three trucks. During the latter part

of the years in question this rate per mile was upped but the ratio as between cars and trucks was kept the same. (2) Taxpayer received a loading and unloading fee for each vehicle handled. This amounted to $3 per passenger car unit and it was increased by one-third or to $4 in the case of a truck unit for loading, unloading and delivery service. (3) Taxpayer also received an additional 75 cents per cargo unit for each 150 miles after the first 150 miles,
105 which was to partially compensate for the driver's lodging. This 75 cent surcharge was also increased by one-third or to $1 in the case of trucks. (4) Taxpayer also received an additional surcharge of $1.50 per cargo unit for "splits." Such a surcharge, of course, would not apply if all four automobile units were delivered to one consignee at a single destination. However, should each of such four vehicles be delivered to four different consignees than a surcharge of $6 would be imposed. This was considered a delivery charge.

The foregoing rates were increased in various respects between June of 1955 and October of 1956 but the amounts of such increases are not material to this dispute.

The taxpayer initially filed Wisconsin income tax returns for each of the four years in question as a unitary business, and in those returns the taxpayer apportioned its net income between Wisconsin and the other states based only on the percentage of revenue miles traveled in Wisconsin. This was slightly in excess of 50 per cent.

The Department made an additional assessment of income taxes against the taxpayer using a two factor formula, i.e., revenue miles and payroll. Payroll was based on where the particular employee was headquartered and not where

he actually earned his salary or wages. The taxpayer duly filed its application for abatement and the Depart-
106 ment revised its formula for determining the percentage of taxpayer's income attributable to Wisconsin and invoked a ratio which took into account the arithmetical average of the following three separate factors: (1) Revenue miles traveled in Wisconsin. (2) Payroll. (The payroll factor was determined by allocating to Wisconsin all executive, supervisory and other non-driver personnel headquartered in Wisconsin and by dividing driver personnel between Wisconsin and other states based on the revenue miles traveled by such driver personnel within and without the State of Wisconsin.) (3) Originating revenues. This factor was deemed to be 100 per cent Wisconsin because all of the taxpayer's revenue was received at Janesville even though the contracts with General Motors were negotiated and executed in Detroit.

Based on the foregoing three factors the computation of the final ratio for each year involved was as follows:

	1953	1954	1955	1956
Payroll	69.445%	64.560%	64.225%	64.545%
Revenue Miles	55.776%	49.977%	51.214%	50.858%
Originating Revenue	100. %	100. %	100. %	100. %
(Divide by 3)	225.221%	214.537%	215.442%	215.403%
Wisconsin percentage	75.074%	71.512%	71.814%	71.801%

As a result of the Department's use of the above described three factor formula taxpayer's total assess-

107 ment was reduced from $34,617 to $34,490 or a reduction of some $127. Taxpayer sought a review of the foregoing additional assessment before the Board and, as indicated, the Board affirmed the Department's additional assessment.

QUESTIONS INVOLVED

There is really only one question or issue involved. However, it may be stated in two different ways as follows: (1) What portion of taxpayer's income is derived from business transacted and property located in Wisconsin? (2) Does the formula utilized by the Department reasonably apportion income properly assignable to Wisconsin?

STATUTES INVOLVED

Section 71.07, Stats., provides, so far as here material (the pertinent language of the statute was not amended from 1951 to 1959):

"(1) • • •

"(2) *Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state.* The amount of such income attributable to Wisconsin may be determined by an allocation and separate accounting thereof, when the business of
108 such person within the state is not an integral part of a unitary business, provided, however, that the department of taxation may permit an allocation and separate accounting in any case in which it is satisfied that the use of such method will properly reflect the in-

come taxable by this state. In all cases in which allocation and separate accounting is not permissible, the determination shall be made in the following manner: There shall first be deducted from the total net income of the taxpayer such part thereof (less related expenses, if any) as follows the situs of the property or the residence of the recipient, provided, that in the case of income which follows the residence of the recipient, the amount of interest and dividends deductible under this provision shall be limited to the total interest and dividends received which are in excess of the total interest (or related expenses, if any) paid and allowable as a deduction under section 71.04 during the income year. The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

"(a) The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with his trade or business everywhere . . .

"(b) In the case of persons engaged in manufac-
109 turing or in any form of collecting, assembling or processing goods and materials, the ratio of the total cost of manufacturing, collecting, assembling or processing within this state to the total cost of manufacturing or assembling or processing everywhere . . .

". . .

"(c) In the case of trading, mercantile or manufacturing concerns the ratio of the total sales made through or by offices, agencies or branches located in Wisconsin during the income year to the total net sales made everywhere during said income year . . .

"(3) Where, in the case of a person engaged in business within and without the state of Wisconsin and required to apportion his income as herein provided, it shall be shown to the satisfaction of the department of taxation, that the use of any one of the 3 ratios above provided for gives an unreasonable or inequitable final average ratio because of the fact that such person does not employ, to any appreciable extent in his trade or business in producing the income taxed, the factors made use of in obtaining such ratio, this ratio may, with the approval of the department of taxation, be omitted in obtaining the final average ratio which is to be applied to the remaining net income.

"(4) * * *

"(5) If the income of any such person properly assignable to the state of Wisconsin cannot be ascertained with reasonable certainty by either of the foregoing methods, then the same shall be apportioned and allocated under such rules and regulations as the department of taxation may prescribe.

"(6) * * *." (Emphasis supplied.)

RULE INVOLVED

"TAX 2.45. APPORTIONMENT IN SPECIAL CASES. When the business of any person within Wisconsin is an integral part of a unitary business conducted within and without Wisconsin, but because of unusual or unique circumstances the portion of the income of such person derived from business transacted in Wisconsin cannot be ascertained with reasonable certainty by use of the apportionment formula provided in section 71.07 (2) of the statutes (or by separate accounting in view of the unitary nature of the business), *the department will substitute in the*

place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin. In any case in which an apportionment of business income is made pursuant to this regulation, the taxpayer, at the time of the assessment, will be apprised of the factors used in the formula adopted. The business income of interstate air carriers shall be apportioned as provided in section Tax 2.46." (Emphasis supplied.)

The Board, among other things, found that there was
111 no evidence in the record that would support a finding that the formula used by the Department taxes net income having a tax situs outside the State of Wisconsin. Obviously, that is not the test. The real test is whether the Board by the use of its formula has taxed only such income *as is derived from business transacted and property located within the State.*

The Board also concluded that the Department's formula adequately determined taxpayer's Wisconsin income and complied with Section 71.07 (5). This falls far short of a conclusion that the Department's formula taxes only such income of the taxpayer as is derived from business transacted and property located within the State.

Taxpayer takes strong exception to several findings or, better perhaps, lack of findings, of the Board. It is not necessary to discuss such alleged errors in view of our conclusion that the Department's formula does not comply with the statute, is probably in violation of the commerce clause of the United States Constitution and is an arbitrary apportionment of income earned in Wisconsin, at least to the extent of the one-third apportionment based

on the originating revenue factor. In its opinion the Board stated that it was basing its decision on *Moore Motor Freight Lines, Inc. v. Department of Taxation*, 14 Wis. 112 (2d) 377, which it felt was conclusive in the matter. This is a rather strange assertion in view of the fact that the *Moore* case in no way considered the correctness of the apportionment formula there used.

In the *Moore* case the taxpayer, an irregular common carrier, had its principal place of business in St. Paul. It maintained no office or terminal facilities in Wisconsin and paid no wages in this State. Obviously driver wages were earned in Wisconsin as over 73 per cent of the taxpayer's revenue miles occurred on Wisconsin highways.

The chief issues in that case were whether or not the taxpayer was doing business in Wisconsin within the meaning of Chapter 71 and therefore subject to taxation on its apportioned Wisconsin income. If so subject, was the tax computed by Wisconsin in violation of either the commerce clause or the Fourteenth Amendment of the Federal Constitution?

In the *Moore* case the Department used a two factor formula. (1) Revenue miles traveled in Wisconsin. (2) Originating revenue.

Inasmuch as originating revenue was all assigned to Minnesota and therefore zero in Wisconsin, the taxpayer's Wisconsin income was figured at 50 per cent of the miles traveled in this State. No one raised any question as
113 to the legality of this formula because it was so obviously loaded in the taxpayer's favor.

In our opininon, in the *Moore* case the Department conceded far too much to the Minnesota corporation, but the mere fact that in one case a foreign corporation is underassessed does not justify the over-assessment of a Wisconsin corporation in a somewhat similar situation. In the *Moore* case the Court, citing from the holding of the United States Supreme Court in the companion cases of *Northwestern States Portland Cement Co. v. Minnesota,* and *Williams v. Stockham Valves and Fittings, Inc.* (1959), 358 U. S. 450, 79 Sup. Ct. 357, and 3 L. Ed. (2d) 421, pointed out that net income from the interstate operations of a foreign corporation may be subjected to State taxation provided the levy is *non-discriminatory and is properly apportioned to local activities within the taxing State* forming sufficient nexus to support the same.

The Court in the *Moore* case held the Wisconsin apportioned income tax constitutional in all respects because it was fairly apportioned and non-discriminatory. This took care of the commerce clause argument. The Court further found that the facilities and benefits, including the protection of Wisconsin laws, all of which were furnished by the taxing State formed a sufficient nexus on which the 114 tax in question could be based. This took care of any due process requirement under the Fourteenth Amendment. To repeat, the actual apportionment formula used was not under attack by either side and was not considered by the Court, even though it was greatly weighted in favor of the foreign corporation's domiciliary State, Minnesota.

In leaving the *Moore* case the following quotation from page 392 of the opinion is in point:

> "In passing, it perhaps should be noted that no issue of multiple taxation is before us on this appeal. Because of the impossibility of successfully attacking the fairness of the apportionment formula here applied by the department, a more-likely forum for raising this issue would be Minnesota, the domiciliary state. The majority opinion in the Portland Cement Co. Case had this comment to make on that problem (p. 462):
> " 'Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domicilary states.' "

Under the doctrine of the *Moore* case the taxpayer in the instant case was clearly doing business in Illinois, Iowa, Minnesota and many other states. Taxpayer was, therefore, subject to a properly apportioned income tax in
115 each of the states in which it was transacting business.

Consequently it is all the more important that the apportionment formula adopted by the domiciliary State be completely free of discrimination if it is to avoid any possibility of creating double taxation. In the Court's opinion the formula adopted by the Department in the case at bar clearly opens the door to the danger of multiple taxation of the same income by more than one State.

Another recent Wisconsin apportionment income tax case which we feel is much more in point than the *Moore* case, *supra*, is *Department of Taxation v. Blatz Brewing Co.*, 12 Wis. (2d) 615. In the *Blatz* case there were two principal issues involved. (1) Whether Blatz was engaged in business within and without the State during 1947 and 1948 when it maintained no sales offices outside the State

of Wisconsin. (2) What was the proper method of determining the property ratio for the years in which Blatz was entitled to apply the apportionment formula?

The Supreme Court reversed the lower court and held that Blatz was only engaged in business in the State of Wisconsin during the years 1947 and 1948 and therefore was not entitled to apportion its income in those two years. However, with respect to the proper method of determining the property ratio the Supreme Court agreed with
116 the Circuit Court. With respect to the issue of the property ratio it concerned the matter of the situs of certain containers, kegs, bottles, neon signs and coolers, all of which were portable items and often in transit. It also concerned the situs of certain furniture, fixtures and automobiles of salesmen and divisional managers. In developing a ratio the Department at first assigned all of the above items to Wisconsin. It then reconsidered and assigned the containers on the basis of the sales ratio reported in each of the two years in question. Both the trial Court and the Supreme Court disagreed with the Department and accepted the accounting method used by the taxpayer to determine the physical situs of the returnable containers. In so deciding, the Court stated at page 626 as follows:

> "On the second question, the department contends the formula in sec. 71.07 (2), Stats., intended to allocate the business income among the sum of the states in which business was done. We do not so construe the statute. Once a taxpayer is 'engaged in business' within and without this state, entitling the taxpayer to use the apportionment formula, Wisconsin is restricted to taxing *'only on such income as is derived*

from business transacted and property located within the state.' It is no concern of Wisconsin that some of
117 the net business may be allocated out of the state where, because of different taxing laws or the absence of them, it is not taxed. Nor is there any requirement the taxpayer in using the apportionment formula, must assign income only to those states in which it is doing business, in the general business sense used by the department. *Apportionment does not give the department the right to collect the most tax but only the fairest share and that share to be derived from business transacted and property* in this state. *Standard Oil Co. v. Wisconsin Tax Comm.* (1929), 197 Wis. 630, 223 N. W. 85.

"The accounting method used by Blatz to determine the physical situs of the returnable containers within Wisconsin was, as the trial court said, a 'factual and sound equitable basis upon which to allocate.' Exact precision in the apportioning of income is not required. *Armour & Co. v. Department of Taxation* (1948), 252 Wis. 468, 32 N. W. (2d) 324. The averaging method applied to property which moves in and out of a state has been approved to determine its location for the purpose of taxation. *American Refrigerator Transit Co. v. Hall* (1899), 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell* (1933), 290 U. S. 158, 54 Sup. Ct. 152; 78 L. Ed. 238. The action of the board of tax appeals, in holding that in the absence of definite proof, the property factor should be based on sales, was arbitrary and capricious. It follows that the allocation of these containers on sales alone, as was done in the modified additional assessment and approved by
118 the board, or on the basis of 50 per cent to sales and 50 per cent to manufacturing, as now contended by the department, cannot be sustained, because those contentions are based on an erroneous theory and

ignore the weight of the property factor in the formula. Such contentions reduce the three-factor formula to a two-factor formula in this case. *The department is bound to use the statutory method even though another method may appear more convenient or expedient to it. Northern States Power Co. v. Tax Comm.* (1941), 237 Wis. 433, 297 N. W. 578. Likewise, the neon signs, coolers, and other personal property should not be apportioned on sales but on their physical location by the method use and as reported by Blatz in its returns . . ."

Blatz was a manufacturer and purveyor of beer. Consequently all three ratios, i.e., property, manufacturing activities and sales, all applied to the ultimate apportionment formula approved by the Supreme Court.

In the instant case the taxpayer is not engaged in manufacturing, assembling or processing of goods nor is it a trading, mereantile or manufacturing concern engaging in sales. Consequently neither the manufacturing nor sales factors prescribed by the statute can be used. However, taxpayer does have real and personal tangible property located both within and without the State of Wisconsin which directly contributes to revenue earned
119 both within and without the State. Consequently we feel that the Board was bound to use the property factor prescribed by Section 71.07 (2) (a) and the failure to utilize such statutorily prescribed factor was error on the part of the Board.

There appears to be no reasonable explanation why the tangible property factor prescribed in Section 71.07 (2) (a) was not used. Taxpayer had terminal, garage and services facilities in states other than Wisconsin. It also

had rolling stock, some of which was permanently located outside the State while the remainder was located without the State for roughly 50 per cent of the time.

The Department either overlooked or ignored the foregoing and arbitrarily substituted a so-called originating revenue factor for the tangible property factor. The factor utilized by the Board has no direct or causal connection to that revenue produced by taxpayer's drivers and other personnel when they perform substantial revenue producing services outside the State of Wisconsin.

The Attorney General argues that the use of the tangible property factor would weigh too heavily in favor of the taxpayer. We do not agree. Perhaps the revenue mile factor weighs somewhat against Wisconsin as only half of the miles were traveled in Wisconsin yet the principal 120 and main terminal activities were located in this State.

On the other hand, the second factor, the payroll factor, certainly weighs heavily in favor of Wisconsin. We say this because most of the permanent supervisory personnel and all of the executive personnel, with their high salaries, were located in Wisconsin and this obviously weighted the payroll factor in favor of Wisconsin. By the use of its originating revenue factor the Department has completely ignored taxpayer's terminal activities in Iowa and Minnesota and all of its unloading procedures which certainly were instrumental in producing revenue. The Department has also completely ignored all of taxpayer's hauls which originated and terminated completely without the State of Wisconsin.

The Department and the Attorney General try to equate originating revenue with sales. The two are not at

all similar and, in any event, the taxpayer is not a trading, mercantile or manufacturing concern and therefore the sales factor cannot be used in any apportionment ratio. Finally, the Department argues that the use of the property ratio would be too difficult to ascertain. In the light of the ruling in the *Blatz* case this argument is without merit. Obviously taxpayer's tangible real and personal property which has a fixed situs poses no problem in the matter of determining a correct ratio. With respect to taxpayer's rolling stock which crosses State lines, this
121 poses a problem quite similar to the returnable containers at issue in the *Blatz* case, and the situs of such rolling stock may be determined in accordance with the directions prescribed by the high Court in the *Blatz* case.

This may be just a coincidence but it appears in the *Moore* case our Department of Taxation was doing its best to assess gingerly the net income of a foreign corporation earned in the State of Wisconsin. In the case at bar it is our view that the Department has done its best to tax more of the taxpayer's net income than was actually derived from services performed and property located within this State. The record shows that the taxpayer here, an Illinois corporation, was originally domiciled in Chicago. It seems to the writer that the action of the Department is best calculated to drive the taxpayer out of Janesville and back to Chicago in order to keep it from incurring double taxation.

Assuming for purposes of argument that taxpayer did move its corporate office back to Chicago it then could receive all its so-called originating revenue in Chicago and that factor, if still used by the Department, would

then weigh heavily against the State of Wisconsin. We use this illustration to indicate that in our opinion the Department has adopted an arbitrary and capricious factor in its apportionment formula.

122 The case must be remanded to the Board of Tax Appeals for further proceedings consistent with this opinion. The Board of Tax Appeals is directed to recompute the additional assessment based on an apportionment formula made up of the following factors: (1) The tangible property factor prescribed by Section 71.07 (2) (a). (2) The payroll factor previously utilized by the Department. (3) The revenue mileage previously utilized by the Department.

Counsel for the taxpayer may prepare the requisite form of judgment reversing the decision and order of the Wisconsin Board of Tax Appeals and remanding same to the Board for further proceedings consistent with this opinion. Same should be submitted to the Attorney General before submission to the Court for signature.

Dated, November 22, 1961.

RICHARD W. BARDWELL
Circuit Judge

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